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*Law, constitutionalism, and world society:
Kjaer, Kratochwil, and global (dis)order*

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Friedrich Kratochwil. *The Status of Law in World Society: Meditations on the Role and Rule of Law*. Cambridge University Press, 2014. Pp. 323. \$34.99. ISBN: 9781107681071.

Poul Kjaer. *Constitutionalism in the Global Realm: A Sociological Approach*. Routledge, 2014. Pp. 178. \$145. ISBN: 9780415733731.

1. Introduction

Two recent books by European scholars, one early and one late in his career, grapple with the issues of law, constitutionalism, and society in the globalized world today. One, *The Status of Law in World Society: Meditations on the Role and Rule of Law*, is by Friedrich Kratochwil, a German emeritus professor from the Istituto Universitario Europeo (European University Institute) in Florence who is a founder and leading figure in constructivist theory of international relations; the other, *Constitutionalism in the Global Realm: A Sociological Approach*, is by Poul Kjaer, a Dane with a PhD from that same Istituto Universitario Europeo and an *habilitation* in sociology of law from Goethe University Frankfurt, Germany. The one (Kratochwil) writes from within and against the discipline of international relations “as his prism” (at 12). The other (Kjaer) writes from within and against a school of sociology of law spanning from Niklas Luhmann to its reconstruction in the work of Gunther Teubner, Kjaer’s adviser, whose work now Kjaer in turn reconfigures. One book (Kratochwil’s) is published in the Cambridge University Press series Studies in International Relations; the other (Kjaer’s), published by Routledge, is subtitled “a sociological approach.” One is written in a free, improvised style of “meditations” with no central thesis, ideas left like luminous feathers strewn in a Tuscan

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wood; the other in a rather ponderous, Teutonic style of argumentation that at times brilliantly unfolds.

Both books aim to address the role of law in the world today beyond the boundaries of nation-states as captured in such tropes as “world society” (Kratochwil), “transnational normative orders” (Kjaer), and “societal constitutionalism” (Teubner, Kjaer’s adviser). Both are digestible, though not easy, books: Kjaer’s at 156 pages and Kratochwil’s at 291. The chapters in Kratochwil can be read like self-standing essays that sporadically play off each other and spool out from a single curious mind.¹ Kjaer’s monograph should be read in a committed ride, at times a bit laborious, but worth the effort, one that itself builds from a formidable body of an accumulating work. Both are important in grappling with the place and role of law in international relations and social ordering in the context of globalization and economic and social crises today. Although the authors write from different disciplinary vantages, and although they do not directly engage each other, their books should be viewed as necessary complements to understanding the prospects and limits of transnational legal ordering through international law and functionally differentiated transnational organizations.²

2. Kratochwil and praxis

Kratochwil provides a self-critique of his expansive efforts in his preface where he presages, “the Meditation resembles more an interior monologue than an explicit argument [Some may find that] I, as the author, seem to engage in a seemingly autistic activity, taking up themes and leaving them after a while unattended” (at xiv). The meditations, labeled 1–9, reflect the author’s internal dialogues with others and himself, for as Kratochwil would agree, there is no single author of ideas, but all ideas build on, take from, interweave, rend, and splice each other. How captivating these reflections are, as we ponder with him as if on a Tuscan hillside over a glass of dark, savory Brunello, rapt in erudite conversation. The citations alone reflect a lifetime of learning, and to read all of them would provide decades of delight for a curious mind. And yet at times, the book does vex with its sudden tangents and turns from one topic to the next.

The nine meditations adopt a methodological approach that stresses a world of “concepts,” rather than “things,” where no concept can provide a universal, Archimedean standpoint. Instead, Kratochwil insists, each concept only stands within a particular social discourse (meditation 1). He then extends this perspective to scrutinize diverse theoretical excursions into the role of law in international relations, ranging from the “concept of law” (meditation 2); “constitutions and fragmented orders” (meditation 3); the role “of experts, helpers, and enthusiasts”—from norm entrepreneurs to international judges (meditation 4); the use of “metaphors and narratives” in framing issues around a “global community,” with a critique of the flaws in Luhmann’s systems theory (meditation 5); the “shortcomings” of the rather technocratic global administrative law project and the limits of calls for a legitimizing role “of so-called civil society groups” (meditation 6); and rights discourses

¹ They are based on lectures delivered at institutes around the globe, from Belo Horizonte to Venice, from Seoul to Budapest.

² See TERENCE C. HALLIDAY & GREGORY SHAFFER, *TRANSNATIONAL LEGAL ORDERS* (2015); and GREGORY SHAFFER, *TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE* (2013).

(meditations 7 and 8). Skeptical of each of these approaches, Kratochwil, in the end, stresses the importance of practical reasoning leading to action (a decision), which affects future practical reasoning, producing knowledge in a world of decision-making, called “praxis.” In this way, we can go on, and, in doing so, “change the way ‘things are’” (meditation 9) (at 25). And so the meditations turn full circle, in the biblical numerology of nine with its Greek and Egyptian antecedents representing eternity.

Chapter 1 builds from his methodological work on the role of norms, including his landmark book published the year the Berlin Wall fell, *Norms, Rules and Decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs* (1989). In that book, Kratochwil critiqued rational choice approaches to knowledge and called for a turn to praxis understood as knowledge developed through communication within a community, grounded in situation-sense, which builds pragmatically on past experience in view of future-oriented social purpose. In contrast to many international law/international relations bridge-building exercises, in which international relations theory becomes hegemonic in purporting to explain law, his work exemplifies the benefits of a two-way flow of law and political science, because he takes legal norms and legal reasoning seriously in shaping expectations and perspectives, and not just as exogenously explained variables reflective of power and interest.

Chapter 2 takes us back to Kratochwil’s earlier explorations of the foundational question of what is law, in which he responds, in the pragmatist tradition, that one cannot answer the question from an Archimedean perspective since the concept of law is a human one. He thus critiques definitions based on sanctions (such as Kelsen’s), on systems (such as Hart’s), and on process (such as MacDougal’s),³ while also rejecting post-modernist indeterminacy in the work of Jacques Derrida and readings of Martti Koskenniemi’s *From Apology to Utopia*. Rather, building on Ludwig Wittgenstein’s theory of language as derived from use and as embedded in a practice community (or “form of life”), he sees law as a form of “language” and a “practice,” involving a “tradition” based on a style of reasoning which includes the use of particular “sources” (at 66–68).⁴ That is the basis for law’s status and role in the world.

In chapters 3–6, Kratochwil turns to evaluate new discourses and tropes in international law theory, such as global constitutionalism and global administrative law. Chapter 3 concerns the new constitutional discourse in international law theory that he situates as a response to anxieties over fragmentation of the international legal order and the proliferation of new functional international organizations, new issues (arising from global interdependence and the externalities of decisions within nation-states), and new instruments, such as soft law. Kratochwil dismisses this constitutional turn in legal theory in light of peoples’ different cultural contexts, the lack of a global community, and the feebleness of international political processes. Yet his own discourse goes further when he appears to reject an enhanced role for international courts and international organizations

³ For a more detailed analysis, see chapter 7, Friedrich Kratochwil, *Rules, Norms and Decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs* (1989).

⁴ For a concordant account within legal theory written at around the same time as Kratochwil’s *Rules, Norms and Decisions*, see Dennis Patterson, *Law’s Pragmatism: Law as Practice and Narrative*, 76 VA. L. REV. 937 (1990).

in global governance because international political processes need first to develop further. What is frustrating is that, by the end of this chapter we are left hanging, since we understand the critique of the use of the constitutional trope as a dream of lawyers in response to particular historical conditions, but we lack an evaluation of actual practice by international courts and other actors, and processes of learning from that practice. These practices should be studied as an (at least potentially) important development in the creation of transnational legal order through praxis.⁵ The type of legal order can be, and is, subject to challenge; nonetheless, it remains a form of praxis within a broader pluralist legal ordering involving different, interacting subject areas (such as trade, environment, trade, finance, environment, health, human rights, culture, security) and levels of social organization.

In chapter 4, Kratochwil turns to soft law and non-state actors whom he sarcastically calls “experts and enthusiasts.” He understands their increased roles as a response to growing complexity, but at the same time critiques advocates of these developments for leaving politics out of the analysis. This chapter, as the others, is a great read and is filled with insights, but it contains no real pragmatic engagement with problem-solving through soft law, which is an increasingly important form of praxis. Once again the chapter exhibits a mocking disdain for legalists and adopts a “realistic” view, scoffing at the pathology and naivité of outsiders dropping into Haiti or East Timor to solve their problems only to be spurned by the local population for their privileges and to depart leaving little positive impact.

Chapter 5 appraises the use of metaphors in international law doctrine and discourse, such as the “progressive development”⁶ of international law toward some global community of humanity—constituting “humanity’s law”⁷—which he critiques from the perspective of praxis and the discrete, concrete, problem-solving work of norms and decisions engaged with ever-new issues. Here he also criticizes Luhmann’s systems theory for its functionalism and missing politics, as well as its reductive conception of law as a binary code dividing the world into legal/illegal. Kratochwil provides examples of the politics of law involving actors and practices at different levels of social organization, citing Judith Resnik’s work on points of entry of the international into local spaces.⁸ He ends the chapter by once again disparaging legalists and their development of legal doctrines such as *jus cogens* and *erga omnes*, which posit an international community that does not exist, and he favors instead the concrete work of discrete problem-solving informed by experience.

Chapter 6 turns its gaze to the global administrative law (GAL) project, and once more is largely dismissive of it. Kratochwil correctly embeds the GAL project in the history of the 1990s, a period characterized by economic liberalization, political transition after the fall of the Berlin Wall, new international institutions, and rule-of-law movements. But then he critiques the project for advocating universal principles that are decontextualized and historically disembedded. GAL proponents, however, could fairly reply that GAL is

⁵ See, e.g., Gregory Shaffer, Manfred Elsig, and Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79(1) LAW & CONTEMP. PROB. (forthcoming 2016).

⁶ Cf. THOMAS SKOUTERIS, THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE (2010).

⁷ Cf. RUTI TEITEL, HUMANITY’S LAW (2011).

⁸ See Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues and Federalism’s Multiple Points of Entry*, 115 Yale L.J. 1564 (2006).

context-driven in its response to particular historical and institutional developments; that it is not an idealist project, but one aimed at making things better than they are. It is a movement that engages with institutional developments and, to use Kratochwil's own terms, in praxis. GAL does not advocate a once-for-all, static model, but rather a mode of engaging with existing institutions, stressing the importance of process and reason-giving. Thus it can be viewed, like Kratochwil's theoretical work, from the vantage of a new legal realism whose two key components are empiricism and pragmatism, and entail learning from experience.

In chapters 7 and 8, Kratochwil scrutinizes rights discourse. He applies the insights of the later Wittgenstein to trace the historical emergence of rights claims out of revolutionary politics, which discourse has now become a part of our tradition and practice. As always, he is skeptical of any rights talk using universal or natural terms, and is particularly hostile toward "juristocrats" usurping the power to pronounce in disregard of politics and context. He stresses how rights rather "require a *particular kind of politics*" (at 229, emphasis added), and thus social institutions and "settled practices" (at 324). In chapter 8, he explores the "grammar" of rights (which are "relational concepts") in terms of their historical sources in order to highlight the political, rather than to impoverish it (at 230–232). He stresses how rights claims involve correlate duties and tradeoffs that call for balancing, as reflected in the doctrine of proportionality. Rights claims thus raise the institutional question of who decides, which he scathingly contends, "cannot be left to some juristocrats" (at 256–257). He reflects how a proliferation of rights, with their focus on individual subjectivity, can undermine the *res publica* (at 255). He contends that we should focus, as always, on the social consequences of such claims, raising once more the question of the political.

Chapter 9 concludes with a meditation on "the bounds of (non)sense." It is a compelling meditation in which Kratochwil critiques ideal theory, from the early Rawls in his *Theory of Justice* to the early Posner in his *Economic Theory of Law*. (Ironically, both Rawls and Posner later abandoned their ideal theories and took a more pragmatic and political turn closer to Kratochwil's, and my own: Rawls in *Political Liberalism* and Posner in a series of works leading to *A Failure of Capitalism*.) In contrast to ideal theory, Kratochwil proposes praxis—a focus on problems and the tradeoffs among alternative feasible solutions in which information can be updated based on experience. Here he cites the pragmatist philosopher John Dewey's critique of conceptions of truth (such as libertarianism in Dewey's time, reflected in neoliberalism in ours) and Dewey's advocacy of contextual problem-solving which allows learning to emerge. Kratochwil's stimulating excursus has much in common with what I have elsewhere termed a new legal-realist approach to international law grounded in empirical study and pragmatist decision-making, involving learning (what Victoria Nourse and I call "emergent analytics") from experience.⁹ It is in that way we can best "go on with our individual and collective projects"

⁹ See Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT'L L. 189 (2015):

Epistemologically, these two components of legal realism are interdependent and infuse each other. The first empirical dimension cannot

(at 291),¹⁰ modifying our means and ends in light of our experience and the ever-new contexts we face.

3. Kjaer's transnational constitutionalism

Kjaer, in contrast to Kratochwil, turns to the transnational with a focus on building sociological theory of constitutional ordering beyond the nation-state. For Kjaer, such transnational normative and constitutional ordering provides stabilizing mechanisms in a world characterized by increased societal complexity and fragmentation. He has a common starting point with Kratochwil in his grounding in historical developments and current crises, and his insistence on the importance of problem-solving and inductive theory building.¹¹ But their disciplinary dispositions take them in entirely different directions, reflected in Kratochwil's stinging criticism of systems theory.

Kjaer argues against methodological nationalism that views constitutions only in relation to nation-states, and thus fails to see the nation-state as only one among many forms of social organization. He immediately opens up a new world of theorizing, as compared to Kratochwil's engagement with conventional state-centered international law, international relations, and constitutional and rights discourses. Kjaer reorients our critical gaze. Unlike Kratochwil, he aims to build a coherent, all-embracing, general theory of constitutionalism and different logics of normative ordering that span history and explain our current conjuncture and future predicaments (at 7), an ambition that instinctively raises the Kratochwilian skeptic's critical eyebrow.

Kjaer works in the intellectual tradition of Luhmann, and he provides a reformulated version of Luhmann's systems theory by focusing on the emergence of transnational, functionally differentiated, constitutionalized normative orders. Kjaer starts his analysis by formulating three distinct organizational logics involving distinct normative orders. The normative orders each consist of "a coherent arrangement of rules, reflecting specific structures of expectations," and they "are linked to the deployment of legal

be completely dissociated from normative and conceptual frames, while the second pragmatic, conceptual dimension is infused with perceptions of facts. They are also necessary complements in a world characterized by dynamic change, since new empirical work and pragmatic practice are always needed to address new factual contexts and new questions. Empirics are needed to inform pragmatic decision-making, and the demands for such decision-making inform the empirical questions asked. The two components interact reciprocally to address law's dynamic character.

See also Gregory Shaffer, *International Law and New Legal Realism*, in 2 STUDYING LAW GLOBALLY: NEW LEGAL REALIST PERSPECTIVES (Heinz Klug, Elizabeth Mertz, & Sally Engle Merry eds., forthcoming 2016); and Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Spur a New Scholarly Agenda*, 95 CORNELL L. REV. 61 (2009).

¹⁰ Kratochwil's book's concluding sentence.

¹¹ Kjaer calls to build theory inductively that is "problem-oriented" (at 6).

sanctions as a means of establishing compliance” (at 65).¹² The three logics are: (i) the territorial logic of the nation-state; (ii) the transnational logic of “functional differentiation”; and (iii) the “traditional” logic of pre-modern, feudalistic-forms of stratificatory differentiation, such as those based on class. Kjaer contends that today we are at a tipping point where “the shifting balance between the nation-state layer and the transnational layer indicates that the reliance on functional differentiation in world society is deepening” (at 3), so that the “legal and the political systems are also in the process of freeing themselves from their internal reliance on territorially delineated stabilization mechanisms” (at 3).¹³ Although Kjaer maintains that the three logics layer each other, and that “the relationship between national and transnational structures is characterized by a relationship of mutual increase” (at 8), he focuses his attention on the emergence of autonomous, functionally differentiated, transnational normative orders, and pays no attention to national ones, including the ways in which national and transnational orders interact.

The book is composed of three parts broken into nine chapters. Part I addresses two major “structural transformations” that give rise to transnational constitutional forms: “the implosion of the Eurocentric world” (chapter 2) and “the multiplicity of normative orders in world society” (chapter 3). Part II reconfigures concepts of law (chapter 4) and the political (chapter 5) in this transformed landscape. Part III posits new “constitutional stabilisation” devices that result from “the breakdown of constitutional ordering through globalization-induced crises” (chapter 6), and are reflected in “the transmutation of constitutional ordering” in Europe and “the global realm” (chapter 7). To understand the response to these changes, he recalibrates “the constitutional concept” (chapter 8), before concluding (chapter 9).

In chapter 2, Kjaer stresses that transnational ordering is not new, but previously coexisted with colonialism, reflected in the center/periphery dichotomy in world systems theory.¹⁴ Europe has since declined as a world power, as has “the West” in relation to “the rest,” reflected in the rise of the G20 following the 2008 financial crisis (at 20). Kjaer contends that, today, the transnational is reflected primarily in fragmented international and transnational organizations with distinct functional mandates playing roles analogous to those of colonial empires. The fundamental question becomes for Kjaer “how society can remain integrated under the structural conditions emerging from the increased primacy of functional differentiation” in relation to nation-state territorial orders and traditional stratificatory social orders (at 22).

In chapter 3, Kjaer starts with Luhmann’s concept of “world society” “understood as consisting of communication,” which he contends has emerged relatively recently and

¹² He defines normative orders “as social structures that are characterized by a coherent arrangement of rules which reflect specific structures of expectations and which deploy legal sanctions as a means of establishing compliance with the expectations upon which they rely” (at 7).

¹³ He defines “modernity ... as the supremacy of functional differentiation vis-à-vis the other forms of social differentiation” (*citing* Luhmann), such as territorial differentiation among nation-states and stratificatory differentiation among social classes, although he notes variation in the ongoing role of stratificatory differentiation around the world (at 22–23).

¹⁴ See, e.g., IMMANUEL WALLERSTEIN, *WORLD SYSTEMS ANALYSIS: AN INTRODUCTION* (2004).

“highlights the universal character of the world” (at 42).¹⁵ While he finds the conception of “world society” useful for challenging “methodological nationalism” across law and the social sciences, he critiques Luhmann’s systems theory, including its reconstruction by Teubner, for its positing of a common horizon for all communications because, for Kjaer, the world consists of “a multiplicity of worlds of meaning” involving different normative orders that produce “independent sources of meaning” (at 46). For Kjaer, it is these diverse normative orders institutionalized in organizations that should be the “basic unit of study for social sciences and law” (at 46), rather than the nation-state or the global. Kjaer thus situates his approach between the extremes of Luhmann’s systems theory with its universalist aspirations and Shmuel Eisenstadt’s cultural approach “which sees the major civilisations of the world as the central units of study” (at 49). He aims to advance theory that accounts for both horizontal differentiation among different systemic logics as in Luhmann (law, politics, economy, religion, art, and so forth) and vertical layering between the transnational, national and local, which thus provides for greater contextualization (at 50).

In Chapter 4, Kjaer conceptualizes law within and between normative orders, building on concepts of the hybridity of law (involving the interaction of law and social processes, giving rise to “living law”), fragmented law (along functionally differentiated lines), heterarchical law (involving new multi-dimensional conflicts of law between state-based legal orders, functionally differentiated regimes, and diagonal conflicts across them), and inter-contextual law (involving the interpenetration of different systems facilitated by governance arrangements between normative orders). Kjaer distinguishes between the internal and external dimensions of legal orders where the internal dimension serves to ensure a “condensation” of norms, while the external dimension serves to establish “compatibility” among normative orders, including national and transnational forms of ordering (at 75–76). Transnational processes focus in particular on facilitating learning through networks that help embed normative orders by enhancing their adaptive capacities (at 77).

In Chapter 5, Kjaer develops a new understanding of politics in the transnational sphere. He maintains that one cannot simply transfer standards of political legitimacy from the nation-state level to the transnational level because they have different structural contexts. He contends that the transnational level has developed functional equivalents to key concepts such as the nation, the public sphere, and democratic representation, in the form of stakeholders, transparency, and normative justification of decision-making (or reason giving) through the self-representation of transnational organizations.¹⁶ These functional equivalents reflect a much more “cognitive-based administrative than normatively driven political, rationality” (at 96), giving rise to new forms of technocratic managerialism.¹⁷ These are important insights for the study of transnational legal orders in which transnational organizations seek to gain legitimacy through these means.

¹⁵ This view also is reflected in the world polity school of sociology that focuses on modernization processes from a cultural vantage. See John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC.144 (1997).

¹⁶ The new “transnational form of the political relies on a concept of stakeholders, rather than on the concept of the nation, a concept of transparency, rather than a concept of the public sphere, and a concept of self-representations, rather than a concept of representation” (at 8).

¹⁷ See also MARTTI KOSKENNIEMI, *THE POLITICS OF INTERNATIONAL LAW* (2011).

Chapters 6–8 turn to the question of “how the constitutional concept can be re-worked in order to correspond better to the current structural realities of world society” (at 103). These chapters are the most demanding in the book since Kjaer reconfigures conventional understandings of the concepts of constitution, constitutionalism, and constitutionalization. Part of the problem is that Kjaer does not fully develop his concept of constitution until chapter 8, after having first built the historical and theoretical context for his conception. The uninitiated reader thus waits for conceptual clarification which, when it arrives, comes in obscure, abstract terms. For example, in his summary, Kjaer turgidly explains:

From the theoretical framework outlined above, three core dimensions of a mature constitutionalist order can be deduced. First, a constitutional order is characterized by double reflexivity through a coupling between a constitutional subject, in the form of a hierarchical organization which is capable of reproducing an autonomous source of authority, and a concordant legal framework. Second, constitutionalisation processes imply a specific form of double prestation through a coupling between, on the one hand, an internal reconstruction of an external constitutional subject within the constitutional object, and, on the other, a register of legal rights, establishing a framework for exchanges between the constitutional object and the wider world as represented by the constitutional subject. Third, constitutionalism, through the institutionalization of a double function, in the form of principle-based and legally fortified quests toward universal inclusion delineated along either territorial or functional lines, providing a sense of direction in time through an articulated form of constitutional consciousness. (at 148–149).

To put it more clearly for those not steeped in the Luhmann–Teubner–Kjaer line of reflexive theorizing, he develops a broad conception of constitutions that includes the institutionalization of functionally differentiated normative orders in organizations (at 128). These organizations are reflexive in that they operate under particular logics and translate and process information from the external environment into their own terms. They are, in system-theoretic terms, cognitively open to external information but normatively closed in their communicative logics. His constitutional concept applies to “a whole range of functional sub-systems, regimes, organisations, networks, professions and more or less intangible components, all of which relate to each other in a multitude of ways” (at 110). Kjaer contends that these transnational functionally differentiated constitutions operate simultaneously with state-based ones, as well as traditional social orders.¹⁸

These transnational constitutions, he contends, develop and change in response to demands for functional differentiation to address societal complexity and “the looming threat of social crisis” (at 113). Globalization and the West’s loss of dominance have

¹⁸ Kjaer correctly stresses that “the state has never been the sole source of authority, but has always been a structure which has operated in a social environment . . . [involving] competing social structures” (at 28). Yet, he conventionally calls pre-modern social orders static “household constitutions” that “was the single most important structure for the integration of society in pre-modern Europe” (at 105). Military revolutions gave rise to territorially differentiated modern bureaucratic state systems that in turn led to the territorial constitutions of nation-states.

triggered the fragmentation of normative orders, which include those of new counter-movements (at 104 and 118). The world's ongoing financial crisis reflects, in his words, the lack of "adaptations and re-configurations of the institutional and, indeed, constitutional framing of economic as well as other social processes" (at 128). He blames the crisis on the "fundamentalist ideology" of neoliberalism that "seeks to impose a one-dimensional economic logic on society in its entirety (at 116).

Chapter 7 addresses the "transmutation of constitutional ordering" in world society, looking at the European Union (EU), global economic institutions such as the World Trade Organization, International Monetary Fund, World Bank, and International Organization for Standardization, and counter-movements such as Fairtrade Labeling Organizations International. These constitutional conglomerates consist of "a multiplicity of legally framed, partly overlapping, and partly contradictory, orders" (at 128). They rely even less on territorial differentiation than in the case of the EU, and they thus encounter even greater challenges because of the heterogeneity of the social spaces affected by them. Kjaer concludes the chapter by positing Fairtrade Labeling Organizations International as a constitutionalized normative order because it is legally structured by a written "constitution," has a form of assembly engaging "stakeholders" with criteria for inclusion and exclusion, a "judiciary" in the form of certifiers, and sanctioning mechanisms.

Chapter 8 provides an extensive re-casting of the concept of "constitution" in sociological terms, concluding with the abstract language quoted earlier. Kjaer grounds this concept in formal organizations that help stabilize today's functionally differentiated society. As Kjaer stresses, his "switch from a focus on the state to a focus on formal organisations opens up a conceptual horizon which makes it possible to imagine quite a radical expansion in the sort of organisations which can be observed through a constitutional lens" (at 142). Internally, these constitutions govern the formal organization of a normative order, stabilizing and safeguarding its autonomy and integrity by creating a boundary between the normative order and its environment, criteria for inclusion and exclusion, competences and procedures for decision-making, legal hierarchy, and a locus of authority (at 141). Externally, these constitutions provide a mechanism for interaction to facilitate compatibility with the wider society, including other segmented normative orders within world society. Each constitution is future-oriented in that it is part of a "never-ending quest towards the establishment of normative orders" (at 147).

4. A critique from the complementary perspective of transnational legal ordering

Kratochwil and Kjaer theorize from two distinct disciplines—political science and sociology—to address the role of law today. Kratochwil more conventionally addresses public international law, and does not engage with the potential deep imbrication of such law with national and local legal orders. In the end, it is not clear why he includes the term "world society" in the title since not only is he deeply skeptical of the "cosmopolitan project," but the book's index shows that he uses the term on only five pages within one chapter, and he does so only in passing when he critiques Luhmann's concept of "world

society,” which he places in quotes to indicate his doubt (Kratochwil, at 44 and 231).¹⁹ Kratochwil gives primacy to the political, and he expresses skepticism, at times verging on mockery, of legal theorists who advance constitutional, global administrative, soft-law, and rights-based prescriptions in light of the weakness of international political processes. He concludes his *tour d’horizon* with a call for pragmatism and a focus on praxis.

Kjaer, in contrast, builds a new theory within the broader tradition of systems theory, using the trope of constitutionalism to address the institutionalization of normative orders through proliferating public and private organizations. He gives primacy to the social, rather than the international and national, and theorizes the transnational realm as characterized by functional differentiation involving autonomous normative orders. He also does not engage with the mutual imbrication of transnational, national, and local legal ordering. Thus, neither author addresses where, in my view, the action lies today regarding the role of law in globalization and in response to perceptions of transnational problems, which is in the recursive interaction of legal and political ordering among and between the transnational, national, and local planes, which include public officials and private actors.²⁰

As for Kratochwil, I largely agree with the conclusions of his meditations and appreciate their pleasant romp and conversational form. Arguably because we never arrive at some promised land of theoretical closure, there is none of the boredom of Dante’s or Milton’s descriptions of paradise. Rather, we encounter a rousing narrative winding along a tortuous path. We are not out of the dark wood, but there is much illumination along the way.

My primary critique of Kratochwil’s book is that his analysis never leaves the international plane and thus fails to address the interaction of the international level with national law and practice, which is central to the creation of order through law. That is the very aim of international law today in its fragmented complexity. Kjaer’s book, despite its grounding in systems theory which Kratochwil critiques for its elision of politics, complements Kratochwil’s book by addressing transnational developments in legal ordering across functional domains. Theories of transnational legal ordering and the creation of transnational legal orders should build on Kratochwil’s insights by extending them to the interaction of international, national, and local legal practices.

My second critique is that Kratochwil provides us with no clear conceptual tools for the empirical examination of the role of law in international affairs today. Instead, he criticizes legal projects for what he sees as ideal normative theorizing. However, at least some of these projects view themselves as pragmatic endeavors calling for an examination of praxis. I am particularly sympathetic to the global administrative law project, which I view in terms of the development of new conceptual tools that can be pragmatically applied in a dynamic fashion in order to address the spread of functional regimes that Kjaer

¹⁹ He notes in passing that his use of the phrase “world society” in the book’s title could recall Luhmann and Luhmann’s school, who replace the “international” with the “global” and “states” with “society,” but he “resists that temptation” and rather looks more to Hersch Lauterpacht’s *The Function of Law in the International Community* as a predecessor. (Kratochwil, at 1).

²⁰ In this vein, see HALLIDAY & SHAFFER, *supra* note 2; and SHAFFER, *supra* note 2.

theorizes in constitutional terms.²¹ Ironically, Kratochwil argues against universalization and deontology, and for the development of insights from practice, yet the book is written from a bird's eye view and with little guidance for empirical and practical engagement.

Finally, what is curious and paradoxical is that Kratochwil is a political scientist who offers the possibility of a two-way bridge with legal scholars because norms and legal practice lie at the center of his constructivist approach. Overall, however, he comes across as rather disdainful of legal scholars, which is reflected in the repeated use of such terms as “juristorats” to describe the field.²² Yet there are many legal scholars who do not reduce law to ideal theorizing and embrace the political not only in a materialist and instrumentalist sense, reflective of international relations realism and rational institutionalism, but also in a normative one. Such scholars should thus be naturally drawn to Kratochwil's work; this is especially true for those working in a new legal realist vein.²³

Kjaer, in contrast, draws our attention to the rise and proliferation of transnational organizations and situates his discussion in the context of current European and global crises. He complements Kratochwil's approach by expanding the scope of analysis to transnational, functionally differentiated organizations. In doing so, he provides a graded update to Luhmann's and Teubner's versions of system's theory in transnational and constitutional terms. Importantly, he breaks with Luhmann and Teubner in that he contends that the power of the state is expanding both quantitatively and qualitatively in parallel with functionally differentiated transnational legal ordering, rather than being in decline.²⁴ He argues that statehood and transnational ordering are not in a “zero-sum relationship,” but in fact are “mutually constitutive,” reflected today in states' “embeddedness in dense and increasingly global governance networks” (at 31–32).²⁵ Like Teubner, Kjaer breaks with Luhmann by theorizing constitutionalism in transnational terms, since Luhmann implicitly viewed “the state and constitutions as identical” and defined the state as “the structural coupling between law and politics” (at 109). Yet Kjaer differs from Teubner by contending that transnational constitutionalism is best theorized as functionally differentiated normative orders institutionalized in organizations, as opposed to a “societal constitutionalism” involving functional systems operating as a whole, such as law, politics, the economy, science, health, the media, sports, and so forth.²⁶

My critique of Kjaer's book, besides the infelicitous language, is four-fold. First, Kjaer continues an important line of theoretical exploration of constitutions in non-state

²¹ See Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 LAW & CONTEMP. PROB. 263, 314 (2005) (the global administrative law “frame is much less abstract than that of global constitutional or contract analogies, and in being more concrete, helps us focus on forms of transnational law praxis that take place every day in the small-scale encounters—and implicit and explicit processes of recognition—that shape regulatory and market outcomes”).

²² See, e.g., Kratochwil, at 221, 257.

²³ See the symposium on the new legal realism in 52 LEIDEN J. INT'L L. (2015), with follow-up commentary and responses in vol. 53 (2015).

²⁴ Cf. GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997); and GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (2012).

²⁵ He further finds problematic Luhmann's argument that cognitive orders replace normative ones (such as morality), and rather contends that both develop in relation to each other. (Kjaer, at 109–112).

²⁶ Cf. TEUBNER, CONSTITUTIONAL FRAGMENTS, *supra* note XXX.

terms. The challenge raised by much of this discourse, however, is what the particular use of constitutional terminology brings to the analysis of the role, for example, of such organizations as the International Organization for Standardization or Fairtrade Labeling Organizations International. These organizations seem to lack the *gravitas* that the term “constitution” evokes in most social discourse and practice. An alternative approach, one that does not appropriate constitutional terminology, is to examine these organizations as participants in the creation of transnational legal orders which both transcend and encompass nation-states, and whose norms can become deeply imbricated within nation-states and social institutions.²⁷

Some may find that this critique is simply a matter of semantics. However, given the legitimizing valence that goes with the term “constitution,” it is semantics with some resonance for social communication and understanding. Kjaer (like Teubner) adopts constitutional terminology, in part, in light of constitutional constraints on the exercise of power (in this case, the power of functionally differentiated logics imperialistically extending themselves). Yet the term “constitution,” in conventional discourse, also implies that constitutional norms trump majoritarian democratic politics, so that law comes out on top. Given the normatively closed nature of functionally oriented fragmented organizations, and their domination in many cases by actors from the Global North, it is no surprise that scholars from the Global South and outside of the discipline of law (such as Kratochwil) rarely use such discourse. In other words, in practice, there is a risk that well-positioned actors may use constitutional discourse to advance particular logics over others in light of their interests and conceptions of problems, so that it is unclear that the use of constitutional language would actually constrain organizations in the ways Kjaer (and Teubner) advance.

Second, Kjaer deploys the functionalist logic of systems theory that is rightfully criticized for eliding agency and power in its analysis. Kratochwil, for example, critiques Luhmann’s systems theory for its lack of politics in focusing on functional differentiation and evolution, and calls for an investigation of “the world political process rather than the world societal process” (at 148). Certainly, Kjaer is correct in noting demands for functionally differentiated organizations and stabilization mechanisms, but there remains a peculiar lack of engagement with power, including state-based power, where the United States and US non-state actors, and, to a more variable extent, the EU and European non-state actors, play central roles in both bolstering and undermining international and transnational regimes, from the World Trade Organization to the International Criminal Court, the International Organization for Standardization, to fair trade labeling organizations.²⁸ Functional differentiation can be examined simultaneously with agency and power at the transnational, state, and local levels, as opposed to being analyzed only at the transnational level apart from them.

Third, Kjaer stresses the “autonomy” of these constitutions,²⁹ but it seems more profitable to address the *interaction* of these organizations with broader processes of transnational legal ordering. For example, Kjaer contends that “multinational companies,

²⁷ Cf. HALLIDAY & SHAFFER, *supra* note 2; and SHAFFER, *supra* note 2.

²⁸ Cf. John Braithwaite and Peter Drahos, *Global Business Regulation* (2000); HALLIDAY & SHAFFER, *supra* note 2.

²⁹ He refers to each constitutional order “as specific form of autonomous ordering” that are “self-reflexive” (Kjaer, at 141).

globally operating law firms, think-tanks and leading non-governmental organisations are increasingly operating as autonomous norm-producing entities outside the nation-state framework” (at 4). Yet fieldwork indicates that, at least in many domains, these actors and organizations are not simply autonomous: they lobby intensely and enlist nation-states, and their norms reflect, adjust, and filter back into state law. State law also accommodates them, and is thus often complicit in moves toward transnational legal ordering.³⁰ Nation-states and actors within them aim to export their legal norms to and through transnational organizations, and these actors, in turn, bring home, adopt, adapt, and hybridize the norms of transnational organizations.³¹ Indeed, empirical work shows that even national constitutions are not autonomous, but rather borrow and embed transnational legal norms, such as international human rights norms.³² It is this recursive interaction, involving intermediaries and flows of legal norms, where much of the action is. Although it is true that international organizations such as the World Trade Organization, and supranational organizations such as the EU, cannot be viewed as “pure reflections of inter-state bargaining,” they are also not (to quote Kjaer) “autonomous forms of social ordering which constitute their own cognitive spaces on a global scale” (at 4).³³ As Joseph Weiler put it decades ago, the EU is precisely international, supranational, and infranational, at the same time.³⁴

Fourth, an important goal for developing theoretical frameworks is to orient and to provide new means of engaging in empirical projects to better understand, explain, and respond to developments in the world. A shortcoming of Kjaer’s book is the lack of examples and guidance for engaging in empirical work. For instance, the only example of a constitution that he discusses in any detail is that of Fairtrade Labeling Organizations International. Yet, after he explains it, he concedes that “[t]he reconstruction . . . says little about the actual effect of the Fairtrade Labeling Organizations International on global trade flows, the environment and global health” (at 132). It seems odd to raise a single organization as an example of the value of a new sociological approach without addressing whether it has any social impact, and what that impact is. There are lots of parchments

³⁰ See Gregory Shaffer, *How Business Shapes Law*, 42 CONN. L. REV. 147 (2009) (including a literature review).

³¹ See BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE* (2d ed. 2003) (on globalized localisms and localized globalisms); SALLY ENGLE MERRY *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006); YVES DEZALAY & BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002); and SHAFFER, *supra* note 2. For a variant of systems theory that focuses on interaction as opposed to autonomy (Teubner) and layering (Kjaer), see GRALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE* (2010).

³² See, e.g., Zachary Elkins, Tom Ginsburg, & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence and Human Rights Practice*, 54(1) HARV. INT’L L.J. 61 (2013).

³³ Although Kjaer does write in his introduction of “complex interaction between public and private elements, in terms of public and private international organisations, public and private international courts and court-like tribunals, private companies, think tanks, non-governmental organisations and so forth,” he does not follow through in the book itself (at 5).

³⁴ See, e.g., Joseph Weiler, Ulrich Haltern, & Franz Mayer, *European Democracy and its Critique: Five Uneasy Pieces*, EUI Working Paper RSC No. 95/11; and Joseph Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 267 (1981).

labeled “constitution,” but that does not mean they operate like constitutions—namely, structure power and help create a sense of collective identity and social integration in any meaningful way. International and transnational theorizing ultimately should help orient empirical work and open new vistas for understanding and responding to order and disorder in the world today. Otherwise, it risks methodological fetishism, tying itself up in its own self-referential (reflexive) categories.

A fruitful way to build on Kratochwil’s and Kjaer’s insights is by fostering the study of transnational legal ordering and transnational legal orders.³⁵ Transnational legal orders extend beyond the domain of nation-states and the society of nation-states, studied by Kratochwil, and engage with the transnational functional differentiation of society theorized by Kjaer. They involve, ultimately, the study of praxis, emphasized by Kratochwil, but extend that study to the interaction between transnational, national, and local legal practice, involving public and private actors. Such an approach studies and theorizes the framing of problems, the construction of legal norms, their propagation, contestation, resistance, change, and impacts. It focuses not only on the international or transnational level set off from national law and local practice, but also assesses the export, import, interaction, settlement, unsettlement, alignment, and misalignment of national law, local legal practice, and international and transnational legal norms. The work of Kratochwil and his emphasis on *praxis* and that of Kjaer and his focus on *functionally differentiated transnational legal orders* provide critical components for such analysis. They complement each other in enhancing our understanding of international and transnational legal ordering today in response to ever-new and ongoing global and transnational problems and crises.

³⁵ See HALLIDAY & SHAFFER, *supra* note 2; SHAFFER, *supra* note 2.